SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 911

MILLPAX, a Corporation, and
ROY F. PAXTON, an Individual, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioners, Millpax, Inc., a Corporation, and Roy F. Paxton, an Individual, pray that this Court grant rehearing of its order of April 29, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed March 8, 1963.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioners submit that the action of this Court of April 29, 1963, could only have resulted from a lack of clarity with respect to the arguments advanced by Petitioners in the original petition for certiorari, and for the first primary reason, petition for rehearing should be granted. *Hickman* v. *Taylor*, 327 U.S. 808, 328 U.S. 876, 329 U.S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U.S. 604, 281 U.S. 673.

The simple facts are, that Petitioner, Roy F. Paxton, is facing six years of imprisonment because users of his product, "Millrue", *a dietary food supplement*, so registered in the U. S. Patent Office, and labeled as such in conformity with the requirements of the Federal Food, Drug, and Cosmetic Act, sang its praises.

Such commendation captured the imagination of the Editor of the magazine "Herald of Health", the context of which was not allowed in evidence by the trial court herein, who wrote and caused to be published in that periodical, without the knowledge, sanction, exploitation or approval of the Petitioners, a feature story of these praises.

Admittedly this story did stimulate inquiries concerning the product, but Petitioners answered in each instance with a reply denying that "Millrue" could cure anything.

Try as it might, the government failed to produce a single witness to testify that "Millrue" had been held forth as having therapeutic value in the treatment of any human ailment.

Resort was finally had to the use of government agents, in two transactions, posing as ordinary mail

order customers (Counts III and V of the Indictment), who cited the magazine story and ordered "Millrue" for faked ailments despite the denial in each transaction by the Petitioners that the product had any curative properties.

In the third transaction (Count IV of the Indictment), co-agents of the government, posing as ordinary "over-the-counter" customers, employed every stratagem in their efforts to prevail on Petitioner, Roy F. Paxton, to sell them "Millrue" for human ailments.

The government, in its Brief in Opposition of petition for certiorari (p. 4) argued that these transactions constituted claims on the part of Petitioners that "Millrue" was useful for the treatment of certain ailments.

The "over-the-counter" (Count IV of the Indictment), *was vacated* by the appellate court herein, Petitioners' conviction on this Count being reversed, yet the government in its Brief in Opposition, *supra* (p. 4), submitted to this Court the premise that the evidence adduced in connection with Count IV, supported its claim that "Millrue" was held forth as useful for the treatment of cancer, despite the testimony of Mrs. Rachel A. Harrington, one of the co-agents of the government in this transaction that she did not recall that Petitioner, Roy F. Paxton, had told her or the accompanying government agent that "Millrue" could cure cancer.

2. Petitioners also urge, as a second primary reason for granting rehearing, a substantial ground available to them, although not previously presented. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50. This ground concerns the question as to whether in fact

"Millrue" was misbranded under Section 502 of the Federal Food, Drug, and Cosmetic Act, because of its failure to bear adequate directions for use. This is a requirement under the Act only if the product concerned is a drug in fact or in fiction.

The product was transferred from the category of a special dietary food supplement to that of a drug, only on the argument of the government that, by virtue of the three transactions referred to herein, Petitioners intended their product for use in the treatment of human ailments; and that therefore, "Millrue" was misbranded according to such argument, by reason of failure to bear adequate directions for such use.

The government did not, and could not, contend that "Millrue" was adulterated, dangerous, deleterious or harmful in any respect, nor that the product was worthless, even for the treatment of disease. Indeed, had the product's label included adequate directions for use in the treatment of those ailments faked by the government agents, the charge of misbranding because of that fact would have been wholly unfounded. Therefore, the stratagem of the government was the act that brought about the so-called inadequacy of the label.

Such an interpretation of the drug provisions of the Federal Food, Drug, and Cosmetic Act, is beyond the imagination of man, and the intent of the Congress when the Act was enacted.

If this Court denies certiorari herein, the food, drug, and cosmetic industries will be at the mercy of the government if their products are innocently praised by the consuming public, in the event the government considers such praise as not being well-founded,

regardless of the fact that the manufacturers do not exploit these commendations to their financial gain, as was the case with the producers of "Milltrue".

3. The fines and punishments imposed on the Petitioners herein are inded excessive, cruel and unjust, and clearly violate the 8th Amendment to the United States Constitution.

No good can come from a denial of a rehearing and the issuing of the writ in this cause.

Faith in government at this point, faith in the veracity, the objectiveness, the accuracy of government agents at this level, in affairs such as these, are the priceless, irreplaceable ingredients of democratic government. We should brook no loose handling in these mundane but delicate matters. If executive officials fail here, or grow autocratic, the judicial branch of government must bring them within the confines of their duty. *C. Broughan* v. *Blanton Mfg. Co.*, 249 U.S. 495, 500; *Houston* v. *St. Louis Packing Co.*, 249 U.S. 479, 483-484. *Armour & Co. (Appellant)* v. *Orville L. Freeman, Secretary of Agriculture, et al.*, No. 16,723, United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circ[illegible].

Respectfully submitted,

CHARLES ORLANDO PRATT,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CHARLES ORLANDO PRATT,
Counsel for Petitioners.